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No. ~~525~~ Misc.

In the Supreme Court of the United States

OCTOBER TERM, 1954

EARL P. GREENWOOD, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	9
Conclusion	25
Appendix	26

CITATIONS

Cases:

Barry v. *Hall*, 98 F. 2d 222	19, 20, 24
Craig v. *Steele*, 123 F. Supp. 153	17
DeMarcos v. *Overholser*, 122 F. 2d 16, certiorari denied, 314 U. S. 609	20
Higgins v. *United States*, 205 F. 2d 650	13, 23
Hill v. *United States*, 206 F. 2d 204	24
Howard v. *Overholser*, 130 F. 2d 429	21
Kuczynski v. *United States*, 149 F. 2d 478	22
McCullough v. *Maryland*, 4 Wheat. 316	20
Overholser v. *Boddie*, 184 F. 2d 240	25
Perry v. *United States*, 195 F. 2d 37	21
United States v. *Fox*, 95 U. S. 670	20
Wells v. *Attorney General of the United States*, 201 F. 2d 556	13, 14, 23, 24
Williams v. *Overholser*, 137 F. 2d 545	19
Youtsey v. *United States*, 97 Fed. 937	20

Constitution of the United States and Statutes:

U. S. Constitution:	
Art. I, Sec. 8, Clause 18	20, 26
Tenth Amendment	15, 18, 26
Act of September 7, 1949, c. 535, par. 1, 63 Stat. 686	10, 11

340032—55——1

Constitution of the United States, etc.—Continued

	Page
18 U. S. C.:	
4244	7, 8, 10, 11, 15, 17, 20, 26
4245	10, 11, 17, 28
4246	5, 9, 10, 11, 12, 13, 15, 17, 20, 23, 28
4247	5, 6, 9, 10, 12, 13, 15, 17, 23, 29
4248	9, 10, 12, 13, 15, 17, 22, 23, 25, 30
24 U. S. C.:	
191	19
191a	19
194	19
195	19
196	19
196a	19
196b	19
42 U. S. C. 222	19
Miscellaneous:	
Federal Rules of Criminal Procedure, Rule 20	3
Hearings on S. 850, before a Subcommittee of the Senate Judiciary Committee, 80th Cong., 2d sess., p. 7	18
H. Rep. No. 1319, 81st Cong., 1st sess	17
Report by the Committee of the Judicial Conference of Senior Circuit Judges, dated July 30, 1945	17
S. 936, 81st Cong. 1st sess	18
Sen. Rep. No. 209, 81st Cong., 1st sess	17

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OPINIONS BELOW

The opinions of the court of appeals (Pet. 15) are reported at 219 F. 2d 376. The order and opinion of the district court (R. 36–41) are reported at 125 F. Supp. 777 (W. D. Mo.).

JURISDICTION

The judgment of the court of appeals was entered on February 14, 1955. The petition for a writ of certiorari was filed on March 11, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the district court's finding that petitioner, if released, probably would endanger the safety of officers, property, or other interests of the United States was based on sufficient evidence.

2. Whether the district court committed error in interpreting the provisions of 18 U. S. C. 4246, 4247 and 4248 to authorize the commitment of petitioner who was lawfully in federal custody, charged by indictment with the commission of two felonies, and who was found mentally incompetent to stand trial, when it appeared that such condition might continue indefinitely.

3. Whether the provisions of 18 U. S. C. 4244, 4246, 4247, 4248, which authorize the commitment to the custody of the Attorney General of persons who are incompetent to be tried and dangerous if released, and for whom state care is not available, until any one of these conditions has ceased to exist, violate the Tenth Amendment.

4. Whether the district court's order, pursuant to 18 U. S. C. 4246, 4247 and 4248, committing petitioner to the custody of the Attorney General deprived petitioner of due process of law.

STATEMENT

Petitioner is at present in the custody of the Attorney General at the United States Medical

Center for Federal Prisoners at Springfield, Missouri, following a commitment order entered by the district court on July 30, 1954 (R. 36–38) which was affirmed by judgment of the court of appeals on February 14, 1955 (Pet. 15). The events leading up to and including petitioner's commitment are as follows:

On November 20, 1952, the federal grand jury for the Western District of Missouri returned an indictment charging petitioner in two counts with violations of 18 U. S. C. 2114 by armed robbery of a post office and felonious assault upon a postal clerk, committed on October 22, 1952 (R. 1–3). Pursuant to Rule 20 of the Federal Rules of Criminal Procedure, petitioner consented to transfer of the case to the Northern District of Ohio, where he resided (R. 4). On February 2, 1953, a hearing was held in the district court for that district (R. 5). A psychiatrist who had examined petitioner testified that petitioner was suffering from schizophrenia; would not be fully capable of cooperating with his attorney in his defense, and probably did not understand the full import of his consent to a Rule 20 proceeding (R. 11–13). Thereupon the court remanded the case for disposition to the Western District of Missouri (R. 14, 15).

The District Court for the Western District of Missouri, on February 17, 1953, ordered petitioner to be delivered to the United States Medical Center for Federal Prisoners at Springfield,

Missouri, for an examination and report as to his mental condition (R. 19–20). On April 8, 1953, and again on January 26, 1954, reports of psychiatric examinations of petitioner were prepared by the staff of the Medical Center (R. 116–119, 120–121). The first report recited that in 1945 petitioner had been arrested for robbery and shortly thereafter for assault; that in 1946 he received a one to twenty year sentence on a forgery charge; that he freely admitted holding up a post office in Kansas City; that he also held up a post office in Cleveland.[1] The report concluded that petitioner was suffering from acute schizophrenia and was legally insane. (R. 116–119).

The second report again diagnosed petitioner's illness as schizophrenia. The staff agreed unanimously that petitioner remained incompetent. It found his condition to be chronic with poor prognosis of recovery. The staff recommended that consideration be given petitioner's transfer to a state hospital in his state of residence inasmuch as it was unlikely that he would regain his sanity in the near future (R. 120–121).

On February 2, 1954, the district court modified its order of February 17, 1953, in the light of these reports. The court ordered petitioner returned to the Medical Center for such treatment

[1] There is no record of petitioner's robbing a post office in Cleveland. Apparently the report assumed that the Rule 20 proceeding involved a separate offense.

as might be necessary to determine whether he was acutely or chronically insane (R. 22). In its order the court pointed out (R. 24):

> It now having been determined that defendant is so mentally defective that he will probably never be able to stand trial on the charge pending against him in this Court, a further hearing must be held which will resolve the power to commit defendant as mentally defective under the conditions specified in Section 4247, Title 18 U. S. C., i. e., whether if defendant is "released he will probably endanger the safety of the officers, the property, or other interests of the United States, and that suitable arrangements for the custody and care of the prisoner are not otherwise available".

The court requested certification of a finding with respect to the quoted statutory propositions within five days and, if the answer were in the affirmative, that petitioner be asked to select a psychiatrist pursuant to 18 U. S. C. 4247 to examine him for a hearing to be held pursuant to 18 U. S. C. 4246. The court further requested certification of termination of commitment if in the interim the Attorney General should transfer the petitioner to the custody of state authorities (R. 25).

The Board of Examiners at the Medical Center submitted the requested report, dated February 4, 1954. The board concurred unanimously in

the opinion that the petitioner remained psychotic and incompetent, that his illness was chronic and that there appeared little likelihood that he would recover in the near future to the extent that he might be considered competent (R. 122–123). The board specifically considered petitioner's potential dangerousness as specified in 18 U. S. C. 4247. Though it found no fixed delusions indicating a desire to harm anyone it stated (R. 123):

> The Board agreed that this subject might be considered potentially dangerous to the extent that if released he might conceivably persist in criminal activities of the type with which he is presently charged.

The board recommended that petitioner be placed in the care of a state hospital (R. 123).

Petitioner remained at the Medical Center until May 1954, at which time, pursuant to the court order of February 17, 1953, as modified on February 2, 1954, he was turned over to appropriate authorities of the State of Ohio. The record is not clear on the exact nature of subsequent proceedings in Ohio but it appears that petitioner was examined by the same psychiatrist who testified at the hearing which led to his removal to the Western District of Missouri, and that he found petitioner sufficiently improved to consider him no longer insane in the legal sense (R. 99, 127). In any event,

petitioner was released by Ohio authorities, rearrested on the charges pending against him and returned to the Western District of Missouri (R. 39–40).

On June 18, 1954, counsel for petitioner, appointed by the court, filed a motion for the appointment of psychiatrists to examine petitioner with respect to his competency and for a hearing, pursuant to 18 U. S. C. 4244 (R. 26). On June 23, 1954, the district court appointed the two psychiatrists (R. 29–30) and on July 2, 1954, it ordered petitioner returned to Springfield for determination of his sanity and, if insane, for findings whether his condition was temporary or permanent and whether petitioner, if released, would probably endanger the safety of officers, property or other interests of the United States (R. 33–34). The report of the neuropsychiatric staff, dated July 8, 1954, prepared in response to the court's order, stated that petitioner remained legally insane, that the prognosis for his recovery was poor, and that he would probably require indefinite hospitalization. The staff concluded that petitioner was not potentially dangerous "except to the extent that if released he might persist in engaging in criminal activities similar to those with which he is presently charged" (R. 125–126).

On July 15, 1954, the district court conducted a hearing as to petitioner's mental competency

pursuant to 18 U. S. C. 4244 (R. 35). It heard the testimony of the two court appointed psychiatrists who examined petitioner for a little in excess of one hour and found him to be legally sane (R. 53, 65–66). The court also heard the testimony of Dr. Charles E. Smith, chief of the psychiatric service at the Medical Center who participated in several examinations of petitioner. Dr. Smith testified that in his opinion petitioner was still insane, that his chances of recovery were poor and that, if released, petitioner might continue to engage in criminal activities (R. 103–104). In addition to the testimony, the court received in evidence the four reports previously mentioned (R. 113).

On July 30, 1954, the court entered its order. It found (1) that petitioner was insane and mentally incompetent to stand trial; (2) that, if released, petitioner would probably endanger the safety of officers, property or other interests of the United States; (3) that no suitable arrangements for the custody and care of petitioner, other than commitment to the custody of the Attorney General, were presently available. Based on these findings, the court ordered petitioner committed to the custody of the Attorney General until occurrence of any one of the following conditions: (1) petitioner regained sanity or mental competency; (2) his mental condition improved to the extent that, if released, he no longer would endanger the safety of officers,

property, or other interests of the United States; or (3) suitable arrangements were made for petitioner's custody and care by the State of Ohio (R. 36–38). The court attached an opinion in which it summarized the evidence on which its findings and order were based (R. 38–41).

Petitioner appealed on grounds that 18 U. S. C. 4244; 4246, 4247, and 4248 were unconstitutional and that the finding that he, if released, probably would endanger officers, property or other interests of the United States, was based on insufficient evidence. The court of appeals sitting en banc affirmed, Judge Van Oosterhout dissenting (Pet. 45).

ARGUMENT

Petitioner attacks the validity of his commitment on three grounds. He contends that the district court's findings made pursuant to 18 U. S. C. 4247 were based on insufficient evidence; that 18 U. S. C. 4246, 4247, and 4248 are not to be construed so as to authorize his commitment because he appears to be permanently insane and will probably never be tried; and that, if those sections are construed to authorize the federal government to hold an incompetent person charged with a federal offense if it appears that he will never be tried, they violate due process and constitute an encroachment on the powers reserved to the States.

1. The first point—whether there was sufficient evidence to support the district court's finding that, if released, petitioner would probably endanger the safety of officers, property or other interests of the United States—is raised as a question (Pet. 2), but not argued. It is clearly without foundation.

Under the statute, which speaks in the disjunctive, it is sufficient if petitioner's release would endanger the safety of officers, or property or other interests of the United States. All the psychiatric reports (except the opinion of one of the two psychiatrists appointed pursuant to petitioner's motion) agree that petitioner would probably continue in the type of criminal activity charged. His criminal history certainly supports this view. Thus the court had a reasonable basis for finding a probability—and probability is all the statute requires—that petitioner, if released, would again endanger federal property and officers.

2. Petitioner's contention that proper interpretation would make 18 U. S. C. 4246, 4247, and 4248 inapplicable to insanity of indefinite duration requires an analysis of these sections as well as of sections 4244 and 4245. All five sections were enacted as comprehensive legislation on September 7, 1949, by an act "To provide for the care and custody of insane persons charged with or convicted of offenses against the United States,

and for other purposes." C. 535, par. 1, 63 Stat. 686.

Section 4244 provides the machinery for determination of the mental competency of a person charged with a federal offense when, at any time after arrest and prior to imposition of sentence or prior to the expiration of any period of probation, there is reasonable cause to believe that he is mentally incompetent. On motion of the United States Attorney, of the defendant, or *sua sponte*, the court may appoint a psychiatrist to examine the defendant or commit him for examination to a hospital. The section provides for a hearing, upon due notice, if the psychiatric report indicates that the accused is mentally incompetent or insane. Section 4245 is designed to deal with cases where a person has already been convicted of a federal offense and it is discovered at the prison that there is probable cause to believe that the prisoner was mentally incompetent at the time of trial.

Section 4246 authorizes the commitment of persons found mentally incompetent in hearings conducted pursuant to sections 4244 and 4245. On a finding of mental incompetency, without more, the accused is to be committed to the custody of the Attorney General "* * * until the accused shall be mentally competent to stand trial or until the pending charges against him are disposed of according to law." If, however, the court finds that the additional "conditions specified" in sec-

tion 4247 exist, the commitment is to be governed by section 4248.

Section 4247 is primarily applicable to convicted federal prisoners whose sentences are about to expire. It provides that upon the certification of the Director of the Bureau of Prisons that in his judgment and that of the board of examiners "the prisoner is insane or mentally incompetent, and that if released he will probably endanger the safety of the officers, the property, or other interests of the United States, and that suitable arrangements for the custody and care of the prisoner are not otherwise available," the court in the district of confinement shall hold a hearing upon notice, to determine whether the "conditions specified" exist. If the court determines that the "conditions specified" exist, it is authorized to commit the prisoner to the custody of the Attorney General. Section 4248 provides the term of commitments made pursuant to section 4247. That term runs "until the sanity or mental competency of the person shall be restored or until the mental condition of the person is so improved that if he be released he will not endanger the safety of the officers, the property, or other interests of the United States, or until suitable arrangements have been made for the custody and care of the prisoner by the State of his residence, whichever event shall first occur."

Section 4246, by incorporating the term of commitment set out in section 4248 if the "conditions

specified" in section 4247 are found to exist, supplies an alternative to a simple commitment until the accused is competent to stand trial or the charges are disposed of according to law. The question is whether this alternative, which was utilized in the instant case, is applicable where the prospects that the accused will regain sanity are dubious and he may therefore never be tried.

Wells v. *Attorney General of the United States*, 201 F. 2d 556 (C. A. 10), where section 4246 was construed to permit only temporary commitment pending trial, is of no help in this determination. In that case the commitment was under the first part of section 4246 (without a finding of the additional "conditions specified" in section 4247), *i. e.*, until the defendant became mentally competent to stand trial or until the charge against him was disposed of according to law. That particular provision was held to be inapplicable to a situation where the insanity might be permanent. The same is true of *Higgins* v. *United States*, 205 F. 2d 650 (C. A. 9), in which the commitment was "until such time as said defendant shall become mentally competent or until the further order of the court." 205 F. 2d at 652. None of the district court decisions cited by petitioner (Pet. 11) involved the use of the alternative commitment term provided in section 4248. In fact, the instant case is the only one of which we know where an order for commitment found the "conditions specified" in section 4247 to exist and set

the term of commitment in accordance with section 4248.

The alternative commitment provided by the statute, and used in this case, is of an entirely different type from that used in the *Wells* case. Its term is completely independent of the continued pendency of the charge. It is occasioned by the finding that the accused, in addition to being mentally incompetent, would if released probably endanger the officers, property or other interests of the United States and that commitment to the custody of the Attorney General is the only alternative to turning the accused loose, thereby endangering society, because no other facilities for his custody and care are available.

The term of commitment is to end when any one of three alternatives occur, each of which would eliminate the reason for the commitment. If the accused regains his mental competence he must be released, as he should be. If at that time the charges are still pending, he would then have to stand trial. If they are no longer pending he would be of course entirely free. Commitment must also end under this provision if the accused, though still incompetent, would no longer be dangerous if released. Lastly, if suitable arrangements are made for the custody and care of the accused by the state of his residence, the reason for his federal commitment also ceases, and so does the term of the commitment.

The independence of this term of commitment from the continued pendency of the charge, and the nature of the provisions made for the termination of the commitment, both indicate that it was intended to be for an indefinite period of time and not until petitioner could be tried. This intent is emphasized by the fact that the required findings and conditions are set out in sections 4247 and 4248 which are primarily applicable to convicted prisoners whose sentences are about to expire and against whom of course no charges are pending. It is a special provision for dealing with the problem of insanity in relation to dangerous persons who happen to be in federal custody and who must be cared for somehow since no state will undertake to care for them.

3. Petitioner contends that sections 4244, 4246, 4247, and 4248, if construed to authorize the federal commitment of legally incompetent persons who are or may be permanently insane, constitute an unconstitutional encroachment upon the power to legislate in the general field of lunacy, reserved to the states under the Tenth Amendment of the Constitution.

It must be pointed out, first, that the permanency of petitioner's insanity is by no means established. Dr. Smith, who observed petitioner on numerous occasions, testified that it was very difficult to determine whether petitioner's condition was permanent because of the peculiar character-

istics of schizophrenia (R. 103). He explained that schizophrenia is a disease characterized by recovery or "remission" which may continue for long periods of time but may terminate with a relapse. Furthermore, he testified that as early as January 26, 1954, petitioner had improved sufficiently to be moved from the most acutely acute to the least acutely acute ward (R. 86). Dr. Smith's testimony reflects a medical rather than legal approach to petitioner's condition. Though petitioner may never become sane again in medical terms it is by no means impossible or even unlikely that he would regain his mental competency to stand trial.

However, even if petitioner should never regain mental competency, we believe that the court below correctly stated the law when it said:

> We think that (1) the validity of the legislation in suit does not in any way depend upon the probable duration of the mental incompetency of federal prisoners who, in conformity with Section 4244, are found to be mentally incompetent; * * * [Pet. 15 at p. 20].

Regardless of petitioner's prospects of recovery, his commitment (as pointed out above) to the custody of the Attorney General is not permanent. It is temporary because, in addition to recovery, two alternative conditions for release are spelled out in the order of commitment upon occurence of either of which he would have to be

released., *Craig* v. *Steele*, 123 F. Supp. 153, 156 (W. D. Mo.). These conditions for release are expressly required by section 4248. Thus, the statute itself envisions federal custody which will, in all likelihood, be temporary.

The Act "To provide for the care and custody of insane persons charged with or convicted of offenses against the United States, and for other purposes" which became 18 U. S. C. 4244–4248, was the result of a careful study, extending over a number of years, by a committee of the Judicial Conference of Senior Circuit Judges, under the chairmanship of Circuit Judge Calvert Magruder, working in close cooperation with representatives of the Department of Justice. Sen. Rep. No. 209, 81st Cong., 1st sess.; H. Rep. No. 1319, 81st Cong., 1st sess. The legislative history of the act is fully set forth in the opinion of the court below (Pet. 15 at pp. 8–15).

This history indicates that the alternative commitment provided for in section 4246, if the conditions specified in section 4247 are found to exist, was to apply only under very narrowly defined circumstances and was in no way intended to effectuate general legislation in the field of lunacy. Thus, in a report by the committee to the Judicial Conference, dated July 30, 1945, it was pointed out:

> If the accused's mental disability appears not to be a transitory condition, but in all likelihood he will, because of his insanity,

never be brought to trial, it would seem that as a general rule the federal government should not assume responsibility for his hospitalization merely because he has been accused (but not convicted) of a federal crime. Normally such a person should be turned over to the state of his domicile to be confined in a state mental hospital if hospitalization is called for.

But there may be cases where the accused's domicile cannot be satisfactorily established and where no state will assume responsibility for his care. *The federal government may then be faced with the practical situation that it has lawful custody of a person whom it is not safe to let at large.* [Emphasis added.] [Pet. 15 at pp. 10–11 n–1.][2]

It is submitted that the commitment of persons accused of federal offenses and found to be insane under this statute in no way impinges upon the powers reserved to the states under the Tenth Amendment. It is a truism that the Constitution does not give the federal government power to legislate in the field of lunacy *per se*. However, it does not follow that, in the exercise of functions within the legitimate confines of federal

[2] See also the testimony of Judge Magruder, Hearings on S. 858 before a subcommittee of the Senate Judiciary Committee, 80th Cong., 2d sess., p. 7. Sections 14, 15, and 16 referred to by Judge Magruder are the present sections 4246, 4247, and 4248, respectively. The bill did not pass in the 80th Congress, but was reintroduced as S. 936 in the 81st Congress, 1st sess., and enacted into law.

constitutional power, legislation affecting the custody and care of insane persons cannot be enacted.

Numerous statutes are on the books providing for institutional care of insane persons, in whom the federal government has a special interest, such as active and retired military personnel and civilian employees of the Quarter Master Corps,[3] Foreign Service personnel and employees,[4] inmates of the Soldier's Home,[5] and of the National Home for Disabled Volunteers,[6] United States citizens adjudged insane[7] in the Canal Zone,[8] in Canada,[9] and in the Virgin Islands[10] and patients of the Public Health Service.[10]

These statutes presuppose a prior determination of mental incapacity by a court (*Barry* v. *Hall*, 98 F. 2d 222 (C. A. D. C.)), but if a valid determination has been made, the committed person has no absolute right to be returned to his state of residence in the absence of showing that the state will receive and care for him (*Williams* v. *Overholser*, 137 F. 2d 545 (C. A. D. C.)), except where the statute expressly requires transfer to the place of legal residence upon its ascertain-

[3] 24 U. S. C. 191.
[4] 24 U. S. C. 191a.
[5] 24 U. S. C. 194.
[6] 24 U. S. C. 195.
[7] 24 U. S. C. 196.
[8] 24 U. S. C. 196a.
[9] 24 U. S. C. 196b.
[10] 42 U. S. C. 222.

ment. See *DeMarcos v. Overholser*, 122 F. 2d 16 (C. A. D. C.), certiorari denied, 314 U. S. 609.

The federal government's power to exercise jurisdiction over insane persons, incidental to criminal proceedings, is based on Article I, Section 8, Clause 18 of the Constitution which gives Congress the authority "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." This power, which has been given a broad construction since *McCullough* v. *Maryland*, 4 Wheat. 316, 421, is the constitutional basis for the enactment of criminal laws and procedure. *United States* v. *Fox*, 95 U. S. 670. It is not questioned that, under these implied powers, the federal government, even in the absence of statute, can determine the sanity of a person charged with a federal offense and, if found incompetent, can provide for his care pending trial.[11] Clearly, those provisions of sections 4244 and 4246 which effectuate the above

[11] It is fundamental that a mentally incompetent person cannot be tried for or convicted of a criminal offense. *Youtsey* v. *United States*, 97 Fed. 937, 940 (C. A. 6). Under the common law, when a court determined that an accused was incompetent to stand trial, it could commit him to a custodial institution until he recovered sufficiently to be triable, if ever. *Youtsey* v. *United States*, 97 Fed. 937, 941; *supra*. Due process is satisfied if the determination of mental incompetency is made upon notice and opportunity to be heard. *Barry* v. *Hall*, 98 F. 2d 222 (C. A. D. C.).

principles in dealing with persons accused of federal offenses are valid even though they involve determination of mental incompetency and commitment by a federal court. See *Perry* v. *United States*, 195 F. 2d 37, 38 (C. A. D. C.).

But what if it appears that the accused will never recover sufficiently to be triable? Normally, the incompetent should be released to the custody and care of a state mental institution if such care is necessary. But if, as in the case before the Court, no state will assume responsibility for the custody and care of the accused, and it appears that it would be dangerous to leave him at large, some procedure must be devised by law for the protection of the interests of the public and of the individual. *Perry* v. *United States*, 195 F. 2d 37, 38, *supra*. The accused came lawfully into the custody of the federal government because he was charged with a crime—an injury to the federal public interest. Because of his incompetency the issue of criminality may never be determined, but the federal government must have the power to provide some means to protect its interest from further injury and also to deal with a dangerous incompetent lawfully in its hands. The state of residence of the accused could not be compelled to receive and institutionalize him. See *Howard* v. *Overholser*, 430 F. 2d 429, 433 (C. A. D. C.). The interest of the federal government here is no less direct than in the cases of military personnel and other special classes of persons for whom custo-

dial care is provided by the statutes cited above. It is just as necessary and proper for Congress to pass laws for the custody and care of persons who are accused of federal offenses and are found to be incompetent to stand trial where it is found that such persons, if released, would probably endanger the interests of the United States and no state custody is available. Cf. *Kuczynski* v. *United States*, 149 F. 2d 478, 481 (C. A. 7), suggesting, even before enactment of the present statute, that insane persons accused or convicted of crimes are not entitled to unconditional release without provision for their care and restraint if it be found that their insanity continues.

The procedure under which petitioner was committed to the custody of the Attorney General applies only where there is a finding that the accused, if released, would probably endanger the officers, property or interests of the United States and that other facilities for custody and care are not available. Section 4248 not only provides that the term of custody must cease when state care and custody become available but expressly authorizes the Attorney General to make arrangements for state institutionalization in all cases of commitment under sections 4246 and 4247.

There is thus no inroad by the federal government into the general field of lunacy. The government exercises only its own power to determine the sanity of a person accused of a federal criminal offense and to protect federal interests. Fed-

eral custody ceases when the state of domicile of the incompetent accused assumes custody and care so that the federal interest will remain protected.

As we have already pointed out, the holdings in *Wells* v. *Attorney General of the United States*, 201 F. 2d 556, *supra*, and *Higgins* v. *United States*, 205 F. 2d 650, *supra*, are not really in conflict with this view or with the opinion of the court below. Those courts were dealing only with orders under the first part of 4246 providing for the custody of a defendant *pending trial*, as applied to situations where there was no reasonable probability that the defendants would recover sufficiently to stand trial, and were treating the question presented as if such an order under the first part of 4246 were the sole statutory basis for continued indefinite federal jurisdiction. That was the situation which those courts thought would be unconstitutional. As noted above, the orders which were reviewed in those cases were not based on findings pursuant to section 4247 that the defendants, if released, would probably endanger the safety of officers, property, or other interests of the United States. Nor did the orders provide pursuant to section 4248 that the custody should terminate if suitable arrangements were made for state custody and care. The orders thus failed to provide an alternative to federal custody if the defendants should never regain their sanity and therefore never be tried. The Ninth and Tenth Circuits were not called

upon to consider the constitutionality of federal custody in the light of the findings and commitment terms involved in the instant case.

4. As part of his constitutional argument, petitioner contends that sections 4244, 4246, 4247 and 4248 and the order for his commitment issued thereunder punish him without due process of law (Pet. 2). But, as we have stressed, petitioner is being held, not as punishment, but for treatment because he is dangerously insane and no other jurisdiction will care for him. A commitment for insanity is not punishment. *Hill* v. *United States*, 206 F. 2d 204, 205–206 (C. A. 6). Petitioner concedes that he is insane; in fact, the basis of his whole argument is that he will remain insane and therefore never will be able to stand trial on the charges pending against him (Pet. 7).

Due process of law is satisfied where, as here, prior to commitment, the trial court (after notice and opportunity to be heard) has determined that the accused is presently mentally incompetent to stand trial. *Barry* v. *Hall*, 98 F. 2d 222, *supra*. Having been found mentally incompetent and conceding that he is still incompetent, petitioner "may not complain because the government chooses to provide for him in a proper institution of its own rather than to engage in a tug-of-war with the state to see whether it will take custody or control of him." Huxman, J., dissenting in *Wells* v. *Attorney General of the United States*, 201 F. 2d 556, 563, *supra*. If

petitioner should regain his sanity at any time in the future he would be entitled to be released by the very terms of the order of commitment. Furthermore, habeas corpus would be available at any time to test his insanity and to effectuate his release. *Overholser* v. *Boddie*, 184 F. 2d 240 (C. A. D. C.); 18 U. S. C. 4248.

CONCLUSION

Sitting *en banc*, the court below, which as the court in which the Medical Center is located is the one most concerned with the problem, has reached the correct conclusion in a careful and well-reasoned opinion. There is no actual conflict with the decisions in other circuits which did not have before them the limited circumstances presented by the findings and commitment terms in this case. We therefore respectfully suggest that there is no occasion for further review by this Court at this time, but we recognize, of course, that since the problem is general and recurring the Court may wish to settle the issues authoritatively.

Respectfully submitted.

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APRIL 1955.

APPENDIX

Constitutional Provisions and Statutes Involved

United States Constitution, Article I, Section 8, Clause 18 provides:

> The Congress shall have power * * *;
>
> * * * * * *
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

United States Constitution, Tenth Amendment, provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The pertinent provisions of the United States Code are as follows:

18 U. S. C. 4244:

> Whenever after arrest and prior to the imposition of sentence or prior to the expiration of any period of probation the United States Attorney has reasonable cause to believe that a person charged with an offense against the United States may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or prop-

erly to assist in his own defense, he shall file a motion for a judicial determination of such mental competency of the accused, setting forth the ground for such belief with the trial court in which proceedings are pending. Upon such a motion or upon a similar motion in behalf of the accused, or upon its own motion, the court shall cause the accused, whether or not previously admitted to bail, to be examined as to his mental condition by at least one qualified psychiatrist, who shall report to the court. For the purpose of the examination the court may order the accused committed for such reasonable period as the court may determine to a suitable hospital or other facility to be designated by the court.

If the report of the psychiatrist indicates a state of present insanity or such mental incompetency in the accused, the court shall hold a hearing, upon due notice, at which evidence as to the mental condition of the accused may be submitted, including that of the reporting psychiatrist, and make a finding with respect thereto. No statement made by the accused in the course of any examination into his sanity or mental competency provided for by this section, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding. A finding by the judge that the accused is mentally competent to stand trial shall in no way prejudice the accused in a plea of insanity as a defense to the crime charged; such finding shall not be introduced in evidence on that issue nor otherwise be brought to the notice of the jury.

18 U. S. C. 4245:

Whenever the Director of the Bureau of Prisons shall certify that a person convicted of an offense against the United States has been examined by the board of examiners referred to in title 18, United States Code, section 4241, and that there is probable cause to believe that such person was mentally incompetent at the time of his trial, provided the issue of mental competency was not raised and determined before or during said trial, the Attorney General shall transmit the report of the board of examiners and the certificate of the Director of the Bureau of Prisons to the clerk of the district court wherein the conviction was had. Whereupon the court shall hold a hearing to determine the mental competency of the accused in accordance with the provisions of section 4244 above, and with all the powers therein granted. In such hearing the certificate of the Director of the Bureau of Prisons shall be prima facie evidence of the facts and conclusions certified therein. If the court shall find that the accused was mentally incompetent at the time of his trial, the court shall vacate the judgment of conviction and grant a new trial.

18 U. S. C. 4246:

Whenever the trial court shall determine in accordance with sections 4244 and 4245 of this title that an accused is or was mentally incompetent, the court may commit the accused to the custody of the Attorney General or his authorized representative, until the accused shall be mentally competent to stand trial or until the pending charges against him are disposed of according to law. And if the court after hearing as provided in the preceding sec-

tions 4244 and 4245 shall determine that the conditions specified in the following section 4247 exist, the commitment shall be governed by section 4248 as herein provided.

18 U. S. C. 4247:

Whenever the Director of the Bureau of Prisons shall certify that a prisoner whose sentence is about to expire has been examined by the board of examiners referred to in title 18, United States Code, section 4241, and that in the judgment of the Director and the board of examiners the prisoner is insane or mentally incompetent, and that if released he will probably endanger the safety of the officers, the property, or other interests of the United States, and that suitable arrangements for the custody and care of the prisoner are not otherwise available, the Attorney General shall transmit the certificate to the clerk of the court for the district in which the prisoner is confined. Whereupon the court shall cause the prisoner to be examined by a qualified psychiatrist designated by the court and one selected by the prisoner, and shall, after notice, hold a hearing to determine whether the conditions specified above exist. At such hearing the designated psychiatrist or psychiatrists shall submit his or their reports, and the report of the board of examiners and other institutional records relating to the prisoner's mental condition shall be admissible in evidence. All of the psychiatrists and members of the board who have examined the prisoner may be called as witnesses, and be available for further questioning by the court and cross-examination by the prisoner or on behalf of the Government. At such hearing the court may

in its discretion call any other witnesses for the prisoner. If upon such hearing the court shall determine that the conditions specified above exist, the court may commit the prisoner to the custody of the Attorney General, or his authorized representative.

18 U. S. C. 4248:

Whenever a person shall be committed pursuant to section 4247 of this title, his commitment shall run until the sanity or mental competency of the person shall be restored or until the mental condition of the person is so improved that if he be released he will not endanger the safety of the officers, the property, or other interests of the United States, or until suitable arrangements have been made for the custody and care of the prisoner by the State of his residence, whichever event shall first occur. Whereupon the Attorney General or his authorized representative shall file with the court which made said commitment a certificate stating the termination of the commitment and the ground therefor: *Provided, however,* That nothing herein contained shall preclude a prisoner committed under the authority of section 4247 hereof from establishing his eligibility for release under the provisions of this section by a writ of habeas corpus. The Attorney General or his authorized representative shall have authority at any time to transfer a prisoner committed to his custody under the authority of section 4246 or section 4247 hereof to the proper authorities of the State of his residence.

U. S. GOVERNMENT PRINTING OFFICE 1959